Editor's note: Distinguished by Chevron Oil Co., 32 IBLA 275 (Sept. 27, 1977)

ENERGY PARTNERS
EDWARD B. TOWNE

IBLA 75-374 Decided August 25, 1975
IBLA 75-268A

Energy Partners' appeal from decision by Oregon State Office, Bureau of Land Management, suspending in part geothermal lease application OR 11530.

Affirmed.

Edward B. Towne's appeal from decision by California State Office, Bureau of Land Management, rejecting in part geothermal lease application CA 1164.

Affirmed in part, set aside in part and remanded.

1. Applications and Entries: Amendments -- Geothermal Leases: Applications: Amendments -- Geothermal Leases: Applications: Description

   A noncompetitive geothermal lease application which fails to include all available lands within a surveyed or protracted section, as required by regulation 43 CFR 3210.2-1(c), is properly rejected as to such section. An amendment of the land description in such an application received after the close of the monthly filing period in which the initial application was filed will not be allowed.

2. Administrative Practice -- Applications and Entries: Generally -- Geothermal Leases: Applications: Generally -- Geothermal Leases: Lands Subject to

> Until a final authoritative judicial determination is made of the title to geothermal resources in lands patented with a reservation of all minerals to the United States, a geothermal lease application which omits such patented lands from a section will not be considered in compliance with 43 CFR 3210.2-1(c) requiring all available lands in a section to be described in the lease application. However, the application may be suspended as to that section, rather than rejected, until the title question is resolved.

APPEARANCES: Ralph S. Wood, III, Treasurer, California Energy Company, Inc., San Francisco, California, for Energy Partners; Lowell E. Garrison, Attorney-in-fact, Sacramento, California, for Edward B. Towne.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

These appeals by Energy Partners and Edward B. Towne have been combined because they raise a central issue concerning the adjudication of noncompetitive geothermal lease applications where the applicant did not describe lands in a surveyed or protracted section which have been patented by the United States but with a reservation of all minerals to the United States. The Towne appeal raises an additional issue whether a land description in an application can be amended after the monthly filing period during which the application was filed.

The Towne application, CA 1164, was rejected in part by a decision of the California State Office, Bureau of Land Management (BLM), dated November 25, 1974, as to lands applied for in sections 20, 21, 28, 29, 30 and 31, T. 16 N., R. 10 W., M.D.M., Calif., because the application failed to describe additional lands in each section which were available for geothermal leasing.

In contrast, the Energy Partners' application, OR 11530, was suspended in part by a decision of the Oregon State Office, BLM, dated February 20, 1975, as to lands in section 18, T. 27 S., R. 29 E., W.M., Ore., because "additional land may have been available" in that section. The decision required other action by the applicant in connection with other lands in the application. The appeal does not concern that requirement.

[1] Both BLM State Office decisions were based upon an application of the governing regulation, 43 CFR 3210.2-1, which requires the applicant to submit in his application:

> * * * (c) A complete and accurate description of the lands applied for, which must include all available lands, including reserved geothermal resources, within a surveyed or protracted section * * *. (Emphasis added.)

We have held that if an applicant fails to include all available lands within a surveyed or protracted section in his land description, the application is properly rejected as to the lands applied for in that section. Austral Oil Co., Inc., 21 IBLA 243 (1975); Robert G. Lynn, 19 IBLA 167 (1975). In Lynn and Austral Oil, the available lands omitted from the application description were public lands of the United States.

In his appeal, Towne requests that the land description in his application for section 21 be amended to read NW 1/4 SE 1/4 rather than NE 1/4 SE 1/4. We have recently examined the question of amendment of the land description of a geothermal lease application in an attempt to cure the defect in the application by not describing all available land in a section. In a decision involving this same applicant, Edward B. Towne, 21 IBLA 304 (1975), we held that an amendment of the land description which is received after the close of the monthly filing period prescribed for noncompetitive geothermal lease applications (43 CFR 3210.2-2) will not be allowed. Accordingly, Towne's request to amend is denied, and the BLM California State Office decision is affirmed as to the rejection of section 21 lands from his application because he failed to apply for all the available lands in that section.

[2] The lands omitted from Towne's application in sections 20, 28, 29, 30 and 31 have been patented by the United States under the Stock-Raising Homestead Act of December 29, 1916, as amended, 43 U.S.C. §§ 291-302 (1970), with a reservation of "all minerals" to the United States. Similarly, the lands omitted from Energy Partners' application were patented with a reservation of "all minerals" to the United States, but under the exchange provision of section 8, Taylor Grazing Act of June 28, 1934, as amended, 43 U.S.C. § 315g (1974).

Both appellants assert that their applications to lease should be granted for the sections where they did not describe lands which have been patented by the United States with a reservation of "all minerals." They contend that the patented lands are not available

for leasing, and were not available when they filed their applications, because of the prior ruling in United States v. Union Oil Company of California, 369 F. Supp. 1289 (N.D. Cal., 1973), appeal docketed, No. 74-1574, 9th Cir., January 11, 1974. In Union Oil the United States District Court ruled that the reservation of "all minerals" in a patent issued under the Stock-Raising Homestead Act did not embrace geothermal resources, that the patent conveyed the entire estate in the lands except for the minerals reserved, and consequently, the United States did not reserve title to the geothermal resources where the lands were patented under the Stock-Raising Homestead Act. Towne contends that it would be unfair to penalize him for failing to include the lands patented under the Stock-Raising Homestead Act in his application in view of the District Court's ruling prior to the filing of his application.

Energy Partners objects to the partial suspension of its application for reasons which go to the issue of whether geothermal resources are included within a reservation of "all minerals." It refers to memoranda by Departmental officials to support its contention that the geothermal resources are not "minerals" within the meaning of such a reservation.

Congress has provided in section 21 of the Geothermal Steam Act of 1970, 30 U.S.C. § 1020(b), that geothermal resources in patented lands where the minerals have been reserved to the United States "shall not be developed or produced except under geothermal leases made pursuant to [the Act]." Under that section of the Geothermal Steam Act, the Secretary of the Interior is directed to report to the Attorney General if development is imminent on such lands, or if production from a well drilled prior to the Act is imminent. The Attorney General is then authorized and directed to institute a quiet title action in a United States District Court in the district where such lands are located, and to enjoin production otherwise than under the terms of the Act if the Court determines that the reservation of minerals to the United States includes the geothermal resources. A proviso to section 21 indicates the duties of the Secretary and the Attorney General under the section shall cease, "upon an authoritative judicial determination that Federal mineral reservation does not include geothermal steam and associated geothermal resources."

The Union Oil case, supra, was brought by the Attorney General to quiet title to geothermal resources in lands patented under the Stock-Raising Homestead Act. The Court's ruling is not final and, therefore, we do not believe it is within the meaning of "an authoritative judicial determination" under the proviso of that section.

An appeal before the United States Court of Appeals for the Ninth Circuit is pending, and it is likely that the question posed by section 21 will ultimately be decided by the United States Supreme Court.

If the ultimate controlling judicial ruling is that the United States has title to the geothermal resources in lands patented with a reservation of all minerals, such lands would be available for leasing. Appellants' omission of such lands from their applications would subject their applications to rejection for failure to include all available lands, as required by 43 CFR 3210.2-1(c). On the other hand, if the ruling sustains the District Court's holding and concludes the United States does not have title to the geothermal resources, appellants' applications would not be defective for failing to include such lands.

The arguments made by Energy Partners concerning the "nonavailability" of the land patented with a mineral reservation go to the very issue before the Court in Union Oil and will not be discussed further. For us to take the position, as appellants contend, that the patented lands were not available for leasing would be contrary to the Congressional direction in section 21 of the Geothermal Steam Act that geothermal resources in patented lands with a reservation of all minerals shall be developed only under leases issued under that Act. Pending a final authoritative judicial resolution of the geothermal resource title question, we cannot conclude that there was compliance with 43 CFR 3210.2-1(c) if an applicant omits lands patented with a reservation of all minerals. Therefore, we reject appellants' contentions that their applications should be allowed for the particular sections involved in these appeals because they applied for all available lands.

We are confronted then with the two possible resolutions of the problem posed by these two appeals -- rejection or suspension of the application for the sections in controversy.

Generally where lands are unavailable for leasing, applications are rejected rather than suspended pending future availability of the land. 43 CFR 2091.1. That regulation, however, pertains to situations where land is withdrawn, classified, or appropriated by an entry, selection or lease, or is not subject to the operation of the public land laws. The cases before us do not fall into any of those categories, as the very question of the availability of land is in issue.

It has been recognized that where there is a title dispute over natural resources and no prior appropriation of the land, it is discretionary to suspend applications to lease such resources. Georgette

B. Lee, 10 IBLA 23, 26 (1973). In the Lee case an oil and gas lease offer had been suspended for some eight years pending resolution of a title case, but prior to such resolution the offer was rejected to clear the Departmental records. The Board noted that sufficient time had elapsed to warrant rejection. It also noted the general practice to reject applications rather than suspend them indefinitely to await a change in land status or another contingency. Id. Specifically with respect to title disputes, the Board stated in Lee, at 25:

> The long standing practice of the Department is to reject lease applications where title to the land is disputed and there is no prospect of any resolution of the controversy in the foreseeable future. The basis for this policy is that it is not usually in the best interests of the Government to lease the lands under such circumstances. See Duncan Miller, A-30451 (November 17, 1965); Pexco, Inc., et al., A-28017 (July 11, 1960).

Nevertheless, where circumstances warrant suspension and suspension is not proscribed by 43 CFR 2091.1, applications have been suspended to await contingencies which would determine whether lands should be leased for their resources. E.g., Justheim Petroleum Company, 18 IBLA 423 (1975). In Justheim, oil and gas lease offers were suspended indefinitely pending resolution of prior-filed conflicting state selection applications. Also, oil and gas lease applications filed in Alaska prior to Public Land Order 4582 of January 17, 1969, were suspended in accordance with the terms of that and subsequent orders. See the discussion in Vance W. Phillips, 19 IBLA 211 (1975), which also noted, at 214, that only those offers which were not defective and could reasonably be expected to mature into leases are to be suspended; the defective offers may be rejected.

We are aware of the advantages and disadvantages in rejecting and suspending geothermal lease applications in these circumstances. There are administrative problems in either case. The question of the best approach to serve the public interest and the interests of all individuals involved, including possible junior applicants, is clouded by unknown contingencies. It may be argued that rejection might encourage earlier development of the geothermal resources than suspension, at least as to those lands in a section not subject to a title dispute. This assumes a junior application is filed describing all the available lands in the section including the

patented lands with the mineral reservation. 1/ Although we appreciate the governmental policy to develop new energy sources, the possibility that rejection would favor earlier development of the geothermal resources than suspension is probably more theoretical than real because of practical problems. These include, for example, the necessity for obtaining Secretarial approval of the conditions for development and of obtaining surface owners' agreements for patented lands, as required by 43 CFR 3201.1-5(b), and possible litigation by rejected senior applicants for the other lands in the section. We are not persuaded that rejection rather than suspension would best serve the public policy of energy development.

After weighing all of the considerations involved, we conclude that the BLM should suspend those geothermal applications, not otherwise defective, as to sections where the applicants filed for all available land in the section except for lands patented with a reservation of all minerals, until there is a final authoritative judicial resolution of the geothermal resources title question in those patented lands.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision suspending the Energy Partners' application in part is affirmed, and the decision rejecting Towne's application is affirmed as to section 21 and set aside and remanded for appropriate action

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1/ The lease would issue to the junior applicant after the senior applicant's application is rejected for failure to describe all available lands in the section. The lease could include the patented lands with the mineral reservation, subject to 43 CFR 3201.1-5(b), or the application could be suspended as to such patented lands. In the latter case, the lease could be amended to include the patented lands which were originally applied for in the event of a final court ruling that title to the geothermal resources is in the United States. 43 CFR 3210.2-4. If the final court ruling is that title is not in the United States, the junior applicant would not be the first qualified applicant for the other lands in the section and the lease may be subject to cancellation in the event the senior applicant appealed to the courts. Thus, the question of who may properly be entitled to a lease in these circumstances could very well be extended long beyond the time the title question is actually resolved.

by BLM consistent with this decision as to the other sections involved in his appeal.

Joan B. Thompson
Administrative Judge

We concur:

Newton Frishberg
Chief Administrative Judge

Edward W. Stuebing
Administrative Judge

Joseph W. Goss
Administrative Judge

Anne Poindexter Lewis
Administrative Judge

DISSENTING OPINION OF ADMINISTRATIVE JUDGE MARTIN RITVO:

I dissent from so much of the majority opinion as holds the applications for suspension for the sections in controversy I believe the applications should be rejected to that extent.

As the majority recognizes the longstanding practice of the Department is to reject lease offers which cannot be adjudicated in the foreseeable future. The partial suspension of the offer prevents the development not only of the land in the affected sections subject to dispute but also of the lands not subject to dispute. It seems to me that it is in the public interest to develop unpatented lands in a section when there is no obstacle to such development.

Martin Ritvo
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Frederick Fishman
Administrative Judge